Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DAVID REM,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Whether the application of a clearly erroneous standard of review conflicts with settled precedent from the Court and sister circuits where the viable inquiry surrounds the legal application of the Fourth Amendment (the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits utilize a *de novo* standard for questions of law, while the Seventh Circuit employs a single "clear error" standard for both facts and law)?

(2) Whether petitioner's single piece of luggage, temporarily left on an Amtrak train, could be considered abandoned as a matter of law (obviating the Fourth Amendment search warrant mandate) where petitioner's expectation of privacy was measured solely through the eyes of peace officers?

CERTIFICATE OF INTEREST

The Petitioner, DAVID REM, is represented in these proceedings by Attorney Allan A. Ackerman, Esq., 2000 N. Clifton Avenue, Chicago, Illinois 60614.

Neither party has any other interest nor represents any other party or interest in these proceedings.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, David Rem, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this case on January 16, 1993.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 984 F.2d 806. The decision of the district court is unreported.

JURISDICTION

The opinion and judgment of the court of appeals was entered on January 26, 1993, App., *infra*, 1a-17a. On April 22, 1993, Justice Stevens extended the time within which to file a petition for Writ of Certiorari to and including June 11, 1993 (App., *infra*, 18a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourth Amendment, states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

1. On July 24, 1991 petitioner was indicted in the Central District of Illinois, for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) (App., *infra*, 19a). Following an unsuccessful suppression motion, he entered a conditional guilty plea to the single count drug indictment. On direct appeal his conviction was affirmed. *United States v. Rem*, 984 F.2d 806 (7th Cir. 1993).

2. On May 26, 1991 petitioner, under the *non de plume*, David Riley, purchased a one-way ticket on Amtrak train No. 4 from Los Angeles to Chicago. He paid cash for the ticket. He boarded the train on the same date, travelling in a sleeping compartment and journeying east through the United States. As the train travelled beyond New Mexico, petitioner was told by Amtrak personnel that his particular sleeping compartment had been reserved for others. Accordingly, Amtrak personnel moved him to a different sleeping compartment on a different car.

On May 28, 1991 the train stopped in Chillicothe, Illinois. Petitioner exited the train carrying a back pack. The train departed absent petitioner. Petitioner's *portmanteau*, consisting of a single cocaine laden suitcase, remained aboard Amtrak No. 4.

Petitioner immediately took a cab to the Peoria, Illinois airport. He was able to catch a flight into Midway Airport in Chicago where he took a cab from Midway Airport to Union Station (stopping at a motel to change clothes on the way). Petitioner arrived at Union Station approximately 20-25 minutes after his train arrived. He ran to the sleeping car where upon he was told by Amtrak personnel that the constables had seized his suitcase. Petitioner remained at the station and was arrested some five minutes later while making a telephone call.

3. Petitioner was denied pretrial release. Represented by retained counsel he filed a motion to suppress physical evidence (R. 20). The *sine qua non* of the motion and the pretrial evidentiary hearing related to whether petitioner had abandoned the single piece of luggage. On September 26, 1991, following suppression testimony, the trial court denied petitioner's motion to suppress while finding:

"**. . . it's a very difficult legal question I think . . .**"

* * * *

"**. . . well, it's a fascinating legal issue. I'm not smiling to be facetious here. Obviously the issues are very serious but it is an interesting issue for lawyers . . . this is a close question in my mind and I will try to explain my reasons for that but I do believe it is proper to deny the motions**" (R. 28, Tr. 101, 114-115).[1]

4. Between 1 and 1:30 p.m. on May 28, 1991 the seizing agents were working drug interdiction and were stationed at Union Station, in Chicago. They received a telephone call from a police officer in Kansas City, Missouri who related that a drug arrest had taken place on the Amtrak train in that city. The reporting officer told the Chicago agents that there was another drug suspect named Riley on the train. No further details were related regarding petitioner. The suppression transcript included similar allegations from Amtrak employees after the train had reached Chicago.

Upon receiving the Kansas City information Chicago agents utilized internal Amtrak information which revealed that Riley boarded the train in Los Angeles, a source city, having purchased a one-way ticket for $700 in cash on the day of departure (*Id.* at 11-12).[2] The totality of the information was received between 1:00 and 2:00 p.m.

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[1] At respondent's request the trial court re-opened the suppression proceedings so that respondent could testify. On November 15, 1991 after respondent testified the court re-affirmed suppression denial (R. 35, Tr. 44).

[2] The record is silent as to whether the drug interdiction agents utilized an administrative warrant to get any of the Amtrak train manifests or other information regarding petitioner, cf., *United States v. Miller*, 811 F.Supp. 1485, 1507 (D.N.M. 1993) ([agent] Candelaria has an administrative warrant he uses to get copies of the train manifest).

The Amtrak train arrived at Union Station at approximately 3:30 p.m. Drug interdiction agents met the train and went to the area of the sleeper compartment cars.[3] Amtrak personnel told the agents that petitioner had "jumped off" the train at Chillicothe, Illinois (Tr. 14). After some ten minutes, the passengers having left the train, Amtrak personnel pointed out petitioner's suitcase in the sleeper car luggage rack. Although a drug dog was available at Union Station, and notwithstanding the clear lack of any emergency, the agents decided that since the luggage had been abandoned it could be opened absent a search warrant (Tr. 22, 62-63). An agent took the seized piece of luggage, and, using a knife, opened same finding a quantity of cocaine. The agents took the open suitcase to the DEA offices at Union Station. While doing paper work attendant to the seizure, Amtrak personnel alerted the agents that petitioner had returned to the train. Moments later, the agents left their office and arrested petitioner at a pay phone in the waiting area at Union Station.

As part of a post-arrest investigation, statements were taken from persons in Chillicothe. A cab dispatcher told the agents that petitioner asked about a cab to Chicago because he missed a train and had to get to Chicago (Tr. 58). At the Peoria airport, petitioner asked the ticket agent which Chicago airport was closer to downtown Chicago (Tr. 58, 60).

During the September 26, 1991 suppression proceedings, the parties stipulated to the admission of an affidavit of a general Amtrak supervisor, Tom Quinn (App., *infra*, 20a-21a). In substance, the affidavit sets out the policy

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[3] The last two cars on Amtrak No. 4 housed sleeping compartments.

of Amtrak in connection with items left on the train. Items, including luggage, are remanded to the Amtrak lost and found. If luggage has no outside identification it may be broken into sometime between the 15th-30th day, but only sometimes, "and never before the 15th day" (para. 6 of Quinn's Affidavit, *infra*).

5. In November 1991 the trial court, at petitioner's urging, re-considered the earlier suppression ruling. The trial court re-affirmed the denial of suppression. Petitioner entered a conditional guilty plea. On March 12, 1992 petitioner, a first-offender, received a U.S.S.G. sentence of twelve years in custody.

REASONS FOR GRANTING THE WRIT

I.

Whether the application of a clearly erroneous standard of review conflicts with settled precedent from the Court and sister circuits where the viable inquiry surrounds the legal application of the Fourth Amendment (the Fifth, Ninth, Tenth, Eleventh, and D.C. Circuits utilize a *de novo* standard for questions of law, while the Seventh Circuit employs a single "clear error" standard for both facts and law)?

The court of appeals has erroneously decided an important question of law in a manner that conflicts with decisions of the Court and other federal courts of appeals.

In *United States v. Mendenhall*, 446 U.S. 544, 553 and n. 5, 100 S.Ct. 1870, 1876 and n. 5 (1980), Justice Stewart, joined by Chief Justice Rehnquist, noted that ". . . the correctness of the legal characterization of the facts appearing in the record is a matter for this Court to deter-

mine." Post-*Mendenhall*, the Court maintained fidelity to the implied *de novo* or plenary standard of review. In *Florida v. Royer*, 460 U.S. 491, 501-02, 103 S.Ct. 1319, 1326-27 (1983), Justice White's plurality opinion applied the test without relying on or deferring to the district court regarding the question of seizure. Similarly, in *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 1979-80 (1988), the Court iterated its support for *Mendenhall*'s objective legal test, 108 S.Ct. at 1979 (discussing evaluation of seizure test from *Terry* to *Mendenhall* and noting that "[t]he Court has since embraced [*Mendenhall*'s] test"). The *Chesternut* court applied the test without any deference to the district court on the question of seizure, 108 S.Ct. at 1980. Hence it is clear, beyond peradventure, that the court of appeals declined to evaluate abandonment *vel non* (the seizure of the luggage) under the proper *de novo* standard.[4]

Sister circuits maintain fidelity to Court precedent by reviewing *de novo* Fourth Amendment questions. Examples include *United States v. Adekunle*, 980 F.2d 985, 987 (5th Cir. 1992) (In reviewing rulings on motions to suppress we accept trial court factual findings unless clearly erroneous, but review questions of law *de novo*); *United States v. Feeney*, 984 F.2d 1053, 1055 (9th Cir. 1993) (We review *de novo* motions to suppress evidence. (cites omitted) We review for clear error the trial court's factual

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[4] The genesis for the plenary clear error standard in the Seventh Circuit is *United States v. Spears*, 565 F.2d 262 (7th Cir. 1992), Circuit Judges Flaum, Cummings, Cudahy and Ripple dissenting from the denial of *en banc* review, 965 F.2d at 282-83, cert. denied, 113 S.Ct. 502 (1993). The Seventh Circuit's approach to appellate standards of review in criminal cases was the recent subject of law review commentary, A. H. Kurland, Forward: *The Seventh Circuit as a Criminal Court: The Role of a Federal Appellate Court in the Nineties*, 67 Chicago Kent Law Review, 1, 3-5, 14-20.

findings. (cite omitted)); *United States v. Langston*, 970 F.2d 692, 697 (10th Cir. 1972) (In reviewing the denial of a motion to suppress evidence, we "accept the trial court's findings of fact, unless clearly erroneous." (cite omitted) We review the district court's legal conclusions *de novo*. (cites omitted)); *United States v. Hatch*, 931 F.2d 1478, 1480 (11th Cir. 1991) (the denial of a motion to suppress presents a mixed question of law and fact . . . findings of fact are upheld unless clearly erroneous. Application of law to facts is subject to *de novo* review . . .); *United States v. Maragh*, 894 F.2d 415, 417 (DC Cir. 1990) (We examine the District Court's judgment that the police seized *Maragh* under a *de novo* standard of review, as firmly entrenched doctrine in this Court and the Supreme Court requires, dissent noted). The *Maragh* majority further notes:

> In the Fourth Amendment context, as in the First Amendment setting, appellate judges have "**a constitutional responsibility that cannot be delegated to the trier of fact.**" See *Bose Corp. v. Consumers Union, Inc.*, 466 U.S. 485, 501, 104 S.Ct. 1949, 1959, 80 L.Ed.2d 502 (1984).

894 F.2d at 418, our emphasis.

Fidelity to precedent is the basis for *stare decisis*. The court of appeals declined to give plenary review to the legal questions surrounding abandonment *vel non*. Rather, the court of appeals abandoned the responsibility of *de novo* review by substituting the deferential clear error standard. Application of the deferential clear error standard of review denies the petitioner the opportunity for appellate vindication on legal suppression questions where the Court and the sister circuits eschew that deferential standard while reviewing Fourth Amendment questions of law.

The Seventh Circuit stands alone.[5]

This petition provides an appropriate vehicle to resolve the clear conflict as to the appropriate standard of review consistent with the Court's precedent as interpreted by the circuits.

II.

Whether petitioner's single piece of luggage, temporarily left on an Amtrak train, could be considered abandoned as a matter of law (obviating the Fourth Amendment search warrant mandate) where petitioner's expectation of privacy was measured solely through the eyes of peace officers?

Petitioner suggests that a classic statement by Justice Douglas is apropos. In *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 698 (1960), a divided Court affirmed *Abel*'s espionage conviction. Justice Douglas, with Justice Black conferring, in dissent, stated:

> Cases of notorious criminals—like cases of small, miserable ones—are apt to make bad law. When guilt permeates a record, even judges sometimes relax and let the police take shortcuts not sanctioned by constitutional procedures. That practice, in certain periods of our history and in certain courts, has lowered our standards of law administration. The

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[5] In *Brecht v. Abrahamson*, _____ U.S. _____, 113 S.Ct. 1710, 1716 (1993), the Court affirmed a recent Seventh Circuit *en banc* decision where the issue revolved around the appropriate [appellate] standard of review on collateral review of *Doyle* violations, 113 S.Ct. at 1736. The Court affirmed the utilization of the less onerous *Kotteakos* standard, as opposed to the *Chapman* (harmless-beyond-a-reasonable-doubt standard of review) standard (Stevens, J., concurring, Justices White, Blackmun and Souter, dissenting). In *Greer v. Miller*, 483 U.S. 756, 107 S.Ct. 3102 (1987), the Court embraced the views of the Seventh Circuit dissenting judges *vis-a-vis*, standard of review in § 2254 cases involving *Doyle* violations, 107 S.Ct. at 3106 (Stevens, J., concurring, Justices Brennan, Marshall and Blackmun, dissenting).

> harm in the given case may seem excusable. But the practices generated by the precedent have far-reaching consequences that are harmful and injurious beyond measurement. The present decision is an excellent example.

The government will concede that petitioner was protected by the Fourth Amendment on May 28, 1991. The law presumes that petitioner did not waive his right to be free from an unreasonable search and seizure. In *Barker v. Wingo*, 407 U.S. 514, 525, 92 S.Ct. 2182, 2189 (1972), the Court reminded:

> Such an approach, by presuming waiver of a fundamental right . . . from inaction, is inconsistent with this Court's pronouncements on waiver of constitutional rights. The Court has defined waiver as "an intentional relinquishment or abandonment or a known right or privilege." . . . Courts should "indulge every reasonable presumption against waiver," . . . and they should "not presume acquiescence in the loss of fundamental rights," . . .

92 S.Ct. at 2189 (internal cites and footnotes omitted).

Further " . . . it was incumbent upon the state to prove "an intentional relinquishment or abandonment of a known right or privilege" . . . *Brewer v. Williams*, 430 U.S. 387, 404, 97 S.Ct. 1232, 1242 (1977).

The court below declined to address the constitutional presumption against waiver. Petitioner suggests, respectfully, that the unilateral determination that petitioner abandoned the piece of luggage because he was not on a common carrier where the luggage was found cannot be squared with the presumption against the waiver of recognized constitutional protections. There can be no abandonment absent a waiver. There can be no waiver unless the court indulges in every reasonable presumption against waiver . . . and they should not presume acquiescence.

In *United States v. Place*, 462 U.S. 696, 103 S.Ct. 2637, 2644 (1983), Justice Brennan, joined by Justice Marshall, concurred in the result stating:

> In my view, as soon as the officers seized respondent's luggage, **independent of their seizure of him**, they exceeded the scope of a permissible *Terry* stop and violated respondent's Fourth Amendment rights. In addition, the officers' seizure of respondent's luggage violated the established rule that seizures of personal effects must be based on probable cause. Their actions, therefore, should not be upheld.

103 S.Ct. at 2650.

Petitioner posits his arguments for review and reversal on the composite facts during the afternoon hours of May 28, 1991. The proceedings below showed only that agents working drug interdiction received information from a Kansas City police officer that citizen David Riley was a drug suspect. No details were supplied. After that telephonic communication, the Chicago agents, with the assistance of Amtrak personnel, learned that on May 26, 1991, Riley had purchased a one-way ticket on Amtrak No. 4, paying $700 in cash. Agents further opined that Los Angeles was a source city.[6/7]

The above comprises the totality of facts known to the agents when the Amtrak train arrived at the Union Station in Chicago somewhere around 3:30 p.m. on May 28, 1991.

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[6] In DEA jargon, every large city in the United States is a potential source city.

[7] In *United States v. Miller*, 811 F.Supp. 1485, 1515, n. 41 (D. N.M. 1993), the court, while reviewing six related Amtrak drug prosecutions, noted that Amtrak does not accept checks from passengers under 65 years of age. Younger riders must pay with a major credit card or cash.

The seizing agents met the train, saw no one they suspected to be petitioner and waited for the passengers to deboard. In a conversation with Amtrak personnel, agents learned that petitioner left the train in Chillicothe and that his single piece of luggage remained on the sleeper car luggage rack.[8] An Amtrak employee pointed out petitioner's bag to the agents. Absent a warrant, a dog sniff, or any of the putative Fourth Amendment protections, agents simply seized the suitcase and broke it open. No emergency loomed. A drug dog was nearby and the train Station is three blocks from the United States District Court in Chicago. Petitioner was arrested within 20 minutes of the seizure. In *United States v. Oswald*, 783 F.2d 663, 667 (6th Cir. 1986), the court affirmed a drug conviction finding abandonment where *Oswald* left his cocaine-laden briefcase in the trunk of a burning car and did not attempt to determine the whereabouts of that briefcase until some four or five hours later. The *Oswald* panel noted:

> We think Officer Proaps was entitled to conclude, under the particular circumstances of this case, that a person retaining an expectation of privacy in the contents of the metal briefcase would have come forward within the first two or three hours after the fire. Other courts have not infrequently attached significance, as we do here, to the claimant's failure to come forward when he might have been expected to.

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[8] The various reports prepared by the agents make no mention of any "luggage rack." Rather, the post-seizure reports indicate that the single piece of luggage was taken from petitioner's **sleeper compartment** (App., *infra*, 22a-23a).

In *Rios v. United States*, 364 U.S. 253, 80 S.Ct. 1431, 1434 (1960), the court vacated and remanded a drug conviction. Justice Stewart, for the Court, noted a difference between an original arrest report and suppression testimony, 80 S.Ct. at 1434.

The general rule is that a search must be based on a warrant issued upon probable cause, *Skinner v. Railway Labor Executive Association*, ____ U.S. ____, 109 S.Ct. 1402, 1414 (1989) ("except in certain well-defined circumstances, a search or seizure in [a criminal] case is not reasonable unless it is accomplished by a judicial warrant issued upon probable cause"); the relevant precedents establish that such a search is **presumptively unreasonable**, and the burden is on the government to establish that a particular exception to the warrant requirement applies.

Certainly the examination of an object which is already in plain view is not a search. *Arizona v. Hicks*, 480 U.S. 321, 328, 107 S.Ct. 1149, 1154 (1987) ("a truly cursory inspection—one that involves merely looking at what is already exposed to view, without disturbing it—is not a "search" for Fourth Amendment purposes"). The Supreme Court has already indicated that a dog's sniff of luggage is not a search for Fourth Amendment purposes because the procedure "is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure," *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. at 2644 (1983). In general, virtually any other investigative touching of a suspect's belonging will constitute a search. The Court in *Hicks* held that a search had been performed when a police officer moved a piece of stereo equipment a few inches in order to inspect the serial number. The Court stressed the need for a bright line, stating that "the distinction between looking for a suspicious object in plain view and moving it even a few inches is more than trivial for Fourth Amendment purposes . . . a search is a search even if it happens to disclose nothing but the bottom of a turntable, *Hicks*, 480 U.S. at 325, 107 S.Ct. at 1153 (internal citations omitted).

In *United States v. Hall*, 978 F.2d 616, 620-21 (10th Cir. 1992), the court, while vacating a drug conviction arising out of a similar seizure on Amtrak No. 4 stated:

> Although *Ward* and *Bloom* involve detention of a person, they are relevant here. The same degree or quantum of reasonable suspicion is required to detain a person as is required to detain a person's luggage. (cite omitted) Therefore, when we hold, as in Ward and Bloom, that a combination of factors cannot support reasonable suspicion that a train traveler was transporting narcotics, **a similar combination of factors cannot support a reasonable suspicion that a traveler's luggage contains narcotics.**

978 F.2d at 620-21, our emphasis.[9]

Petitioner asserts that the single piece of luggage was seized absent probable cause. Further, the warrantless seizure, even if accompanied by probable cause, was *conducted* absent the intervention of a judicial warrant. Hence petitioner asserts that settled precedent mandates that the court find that the search was presumptively unreasonable. The government had the burden of justifying a particular exception to the warrant requirement, *United States v. Most*, 876 F.2d 191, 193-95 (DC Cir. 1988).

The singular exception to the warrant requirement, relied upon by the government below, was the unilateral (and subjective) immediate determination that petitioner's

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[9] The *Hall* panel cited to *United States v. Ward*, 961 F.2d 1526, 1528-30 (10th Cir. 1992) (finding drug courier profile unavailing and failing to support reasonable suspicion to detain train passenger suspected of transporting drugs). The panel also cited *United States v. Bloom*, 975 F.2d 1447 (10th Cir. 1992) (same). In combination, *Hall*, *Bloom* and *Ward*, comprise a synopsis Tenth Circuit precedent in connection with Amtrak No. 4 and the purported drug courier profile as supporting reasonable suspicion for the detention of travelers and luggage.

piece of luggage was abandoned. Petitioner submits, respectfully, that there is a sound split in circuits on whether we are talking about a matter of fact—or a matter of law.

In *United States v. Sylvester*, 848 F.2d 520, 524-525 (5th Cir. 1988), the court vacated the denial of *Sylvester*'s pretrial suppression motion with directions that the district court reconsider same. *Inter alia*, the *Sylvester* panel noted:

> As support for this position, the government cites *United States v. Dien*, 609 F.2d 1038, 1044-45 (2d Cir. 1979), adhered to on rehearing, 615 F.2d 10 (2d Cir. 1980) and *United States v. Markland*, 635 F.2d 174 (2d Cir. 1980). We refrain from following the Second Circuit's path in this area. Otherwise, we would be left with the task of categorizing containers based upon whether or not they are "inevitably" used for the storage of private effects. An approach which we believe comes closer to the proper interpretation of *Sanders* is to hold strictly to the rule that a container cannot be opened unless its contents are in plain view or they can be inferred from the container's outward appearance. As a district court in our Circuit held in addressing this same issue: "One man's garbage bag is another man's luggage." *United States v. Rivera*, 486 F.Supp. 1025, 1034 (N.D. Tex. 1980).[10]
>
> * * * *
>
> The government argues that the box "appeared to have been abandoned," but the relevant facts and circumstances do not instruct, as **a matter of law, that Sylvester intended to abandon the property**. He simply was not within sight of the box when the agent opened it. The government does not cite any cases that hold as a matter of law that being out of

[10] 848 F.2d at 525. The panel reference to *Sanders* is *United States v. Sanders*, 719 F.2d 882 (6th Cir. 1983).

> sight of one's personal effects in a public place forfeits one's expectation of privacy in the effects. One court has held, for example, that leaving an airport without claiming one's luggage did not constitute abandonment, *United States v. Sanders*, 719 F.2d 882 (6th Cir. 1983).[11]

Petitioner's position gathers support from *Walter v. United States*, 447 U.S. 649, 100 S.Ct. 2395, 2400, 2402, n. 11 (1980). In *Walter* the Court vacated federal obscenity convictions finding that the court below erred while declining to suppress physical evidence. The *sine qua non* of the prosecution revolved around a series of obscene films that travelled in interstate commerce. The films were misdelivered. Persons receiving the misdelivered films viewed the contents and called the FBI. The FBI picked up the films and viewed same absent judicial authorization. Justice Stevens, *inter alia*, noted:

> It was a search; there was no warrant; the owner had not consented; and there were no exigent circumstances.[12]
>
> * * * *
>
> That separate search was not supported by any exigency, or by a warrant even though one could easily been obtained.[13]
>
> * * * *
>
> . . . Nor can petitioners' failure to make a more prompt claim to the Government for return of the films be fairly regarded as **an abandonment** of their interest in preserving the privacy of the shipment. As subsequent events have demonstrated, such a request could reasonably be expected to precipitate criminal proceedings. We cannot equate an unwill-

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[11] *Id.* at 525, our emphasis.

[12] 100 S.Ct. at 2400.

[13] 100 S.Ct. at 2402, n. 10 omitted.

> ingness to invite a criminal prosecution with a **voluntary abandonment of any interest in the contents of the cartons**. In any event, the record in these cases does indicate that the defendants made a number of attempts to locate the films before they were examined by the FBI agents.[14]

Justice White, concurring in part, also noted:

> We have previously held, however, that police must obtain a warrant before searching a suspect's luggage even if they have probable cause to believe it contains contraband. *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586 (1979); *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476 (1977).[15]

The court of appeals in *United States v. Sylvester*, 848 F.2d at 525 (5th Cir. 1988), noted a split in circuits on abandonment *vel non*. The *Sylvester* panel chose to follow the path of the Sixth Circuit in *United States v. Sanders*, 719 F.2d 882 (6th Cir. 1983) while finding that *Sylvester* **as a matter of law** (not a clearly erroneous question) may not have intended to abandon his hunting box. *Id.* The Fifth Circuit eschewed the opportunity to follow the Second Circuit, *United States v. Dien*, 609 F.2d 1038, 1044-45 (2nd Cir. 1979), on rehearing, 615 F.2d 10 (2nd Cir. 1980) and *United States v. Markland*, 635 F.2d 174 (2nd Cir. 1980). The Seventh Circuit has opted to follow the Second Circuit *viz.*, abandonment as a matter of fact, not a question of law.

The breadth of the circuit conflicts are subject to debate as the conflicting opinions indicate. Review by this Court is needed to resolve this important issue of Fourth Amendment law.

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[14] 100 S.Ct. at 2402, n. 11, our emphasis.

[15] 100 S.Ct. at 2404. *Arkansas v. Sanders*, *ante*, was overruled on other grounds, *California v. Acvedo*, 500 U.S. ____, 111 S.Ct. 1982, 1988-91 (1991).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-1672

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DAVID REM,

Defendant-Appellant.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
No. 91 CR 10043—**Michael M. Mihm**, *Chief Judge.*

ARGUED NOVEMBER 17, 1992—DECIDED JANUARY 26, 1993

Before POSNER, COFFEY and MANION, *Circuit Judges.*

MANION, *Circuit Judge.* David Rem boarded a train in Los Angeles destined for Chicago. He departed the train during a stop outside Chicago, but left his suitcase containing 18 kilograms of cocaine on the train. After all passengers deboarded in Chicago, the police obtained the suitcase and opened it without a search warrant. Rem pleaded guilty to possession of a controlled substance with intent to distribute but reserved the right to appeal the district court's denial of Rem's motion to suppress. The district court found that the suitcase was abandoned, leaving Rem with no expectation of privacy. We affirm the district court.

I.

At the hearing before the district court on David Rem's motion to suppress, Thomas P. Kinsella, a Chicago police officer assigned to the Drug Enforcement Administration (DEA) Task Force, testified that on May 28, 1991, at approximately noon, he received a telephone call from the police in Kansas City, Missouri, regarding a suspicious person on the Amtrak train which runs from Los Angeles to Chicago. The Kansas City police told Kinsella that they had arrested two people on the train's sleeper car 0430 in an unrelated drug investigation. They had learned from train employees that another passenger on sleeper car 0430, traveling under the name of David Reilly, bought his ticket in Los Angeles with a large amount of cash; kept his suitcase with him in his compartment; stayed in the sleeper car, having meals brought to him; and would not allow the car attendant to come in and make his bed.

Kinsella spoke with Amtrak personnel and discovered that "Reilly" had boarded the train in Los Angeles, a source city for narcotics, and was ticketed through to Chicago. He paid over $700 in cash for the ticket; purchased the ticket on the day the train was to leave Los Angeles; and left a call-back telephone number which was actually a disconnected number. The information suggested to Kinsella that Reilly might be a narcotics courier.

At about 4:00 that afternoon Kinsella and Agent Michael Bobko and an Amtrak police officer, Dennis Kroll, met the train when it arrived. They spoke with several cars attendants, who reported that Reilly had "jumped off the train" in Chillicothe, Illinois, carrying only a backpack. Kinsella testified on cross-examination:

> The train had stopped. The car attendant—one of the car attendants was assisting an elderly woman, who was the only passenger who was scheduled to get off in Chillicothe, was assisting her off the train and Mr. Rem pushed by her and pushed by the elderly woman and jumped off the train. . . . She described it as almost running away from the train.

Kinsella also testified, in answer to the court's questions, that one car attendant expressly stated that defendant "jumped." He explained further:

> [S]he said that he . . . jumped over the stairs and began running in the direction away from the train. She said that she started to say something to him. She said 'sir' in a loud voice, and he just continued running and she didn't say anything after that.

One of the train's car attendants at Union Station then told Kinsella that "Reilly" had "left his suitcase on the luggage rack right inside of the train." All of the sleeper car attendants stated that they had not moved the suitcase. After all passengers deboarded the train, Kinsella was given the suitcase:

> Shirlene Mitchell, the crew chief for sleeper car attendants, stepped inside of the train and I followed her in and she pointed to a gray Samsonite oyster suitcase on the luggage rack and stated that was the passenger David Reilly's suitcase. It was the only piece of luggage left on the sleeper car.

The suitcase had no identification or tags on it. Kinsella testified that the Samsonite suitcase was often used for carrying drugs because of its hard sides and rubber gasket seal. The crew chief asked Kinsella to lift the suitcase from the luggage rack because she could not reach it. Kinsella then "removed the bag from the top shelf of the luggage rack."

Kinsella explained that a sleeper car contains a number of small compartments and several deluxe bedroom compartments. Defendant was in deluxe bedroom "B" from Los Angeles to Albuquerque; he then transferred to a smaller sleeper compartment number 9. The smaller compartment is located along the hallway of the second floor. The luggage rack where Kinsella found defendant's suitcase is located on the lower level adjacent to the exit door of the sleeper car, directly next to the exit door of the sleeper car. It is an open rack. It is available for use by the whole train car. (Officer Bobko described the train

car similarly.) Kinsella took the suitcase outside onto the platform. The crew chief said she would turn the bag over to Kroll [the Amtrak officer] "because of the circumstances that had previously occurred." As Kroll watched, Kinsella used a pocket knife to pop open the suitcase. (There were two locks on the side of the suitcase which were not locked, and a plastic combination lock over the center of the suitcase which was locked.) The suitcase contained 18 brick-shaped packages of cocaine. They carried the suitcase to Kinsella's office in the train station.

Ten minutes after Kinsella brought the suitcase to his office, several Amtrak employees came in to report that they had just seen "Reilly," although his clothing was different. Kinsella and Bobko left the office and entered the station's lobby area, where they saw Rem talking on a pay telephone; he "appeared very excited," waving his hand in the air. Kinsella and Bobko approached Rem and asked if they could speak with him. Rem nervously attempted to hang up the telephone. When asked, Rem, his hands shaking, produced a New York driver's license in the name of David Rem.

Kinsella testified further that Rem denied being aboard the train from Los Angeles at any time; in fact, he denied being aboard any train at all. He stated that he was "just looking around" the train station. He had been in Chicago for two weeks and was staying at a motel, although he could not remember the name or location of the motel. Several car attendants and crew chief identified Rem as the individual traveling under the name of David Reilly. Rem was then placed under arrest.

On cross-examination, Kinsella stated that one Chicago police department summary report stated the luggage was found in the "sleeper car"; another summary report stated it was found in the "train compartment"; and the criminal complaint referred to locating the suitcase in the "sleeping car." Kinsella testified further that he kept a trained dog accessible, but he did not believe it was necessary to use

the dog once it was determined that the luggage had been abandoned.[1]

Kinsella's subsequent interviews of witnesses in Chillicothe revealed that Rem exited the train, entered the train station, and asked the ticket agent about transportation to Chicago, possibly "at the time the train was in the station." Rem said nothing to the ticket agent about missing the train, and nothing about his suitcase. He then went to a local restaurant and asked about transportation to Chicago, explaining only that he had to "meet someone." He did not mention the suitcase. Rem telephoned a local taxi dispatcher, who asked him whether he had missed his train, and he replied, "Yes." He then took a cab to the Peoria airport, and bought a plane ticket at 2:40 p.m. to Chicago. In Chicago, Rem checked into a motel at 4:05 p.m.

Officer Michael Bobko testified similarly, adding that when he and Kinsella met the train at 4:00 p.m., he watched as Kinsella stepped out of his view for only "a few seconds, long enough to go up the stairs, go out of my sight and come right back into my view with the suitcase."

Bobko later interviewed Jack Broyles, an attendant on car 0430. Broyles spoke with Rem several times after the Kansas City stop and before the Chillicothe stop.

> Broyles stated that Rem has asked him about the incident in Kansas City where two men had been arrested by Kansas City police officers and Broyles related to me that he informed Rem that there had been an arrest for narcotics involving the Kansas City

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[1] Kinsella testified that routinely, a drug-sniffing dog was not used for abandoned property. Instead, the "only reason that we have the dog is if we have enough facts to detain an individual's luggage and he does not give us consent to search the luggage and if we have enough reasonable suspicion to detain the luggage, we have the dog examine it at that time." Moreover, it was his practice to bring the suitcase to the dog, who was kept about one block from the station.

police and Broyles stated that he told Rem he didn't know too much more about it.

The district court denied Rem's motion to suppress. Subsequently, in response to Rem's motion for reconsideration, the district court permitted him to appear on November 15, 1991 and testify regarding the motion to suppress.

Rem testified that on May 26, 1991 he traveled to Los Angeles for the purpose of acting as a drug courier. On that day, he was given the drugs and cash by his "contact," Hector. Rem testified that he was in car number 0431, not 0430; that he did not remain in his private compartment or ask the staff to bring him meals; that he knew nothing about the arrests in Kansas City because he slept late that morning; and that he never put his suitcase in the public luggage rack.

Rem testified further that in Chillicothe, he deboarded without hurrying and without seeing any other passengers deboard. Within three minutes, he realized that the train had left, although he stood at the telephone which was 40 feet from the tracks, with an unobstructed view. After flying in to Chicago, Rem took a taxi to a motel in order to change his clothes, to telephone a friend in New York whose mother was going to be having surgery, and to provide himself with a safe place to return with the suitcase.

Rem went to Union Station at about 4:25 p.m., walking directly to the train, where several Amtrak employees near the train told him that the police had broken into his suitcase. He went to a pay telephone in the station, called Amtrak and explained, "I'm in Chicago and this worker just told me about the police breaking into my bag. Why was this done? How can I get my bag?" Rem continued: "And at that point . . . in my trip I had no intention of leaving that station or my bag because I'm in big trouble without my bag." In response to the court's questions, Rem stated: "At that point I even knew I would be arrested, but I would prefer to be arrested than to try to show up and explain with no concrete proof of where

the drugs were because the people might think that I just—that I'm lying and I took off with their drugs." Rem also told the court: "I was only temporarily and I think very momentarily separated from my luggage."

II.

A. Standard of Review

A reviewing court will not disturb the trial court's decision on a motion to suppress evidence absent clear error. *United States v. Gillespie*, 974 F.2d 796 (7th Cir. 1992); *United States v. Spears*, 965 F.2d 262 (7th Cir.), *cert. denied*, 113 S. Ct. 502 (1992). A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *United States v. D'Antoni*, 856 F.2d 975, 978 (7th Cir. 1988). Thus, the district court's factual findings regarding abandonment will be reversed only if clearly erroneous. *United States v. Nordling*, 804 F.2d 1466, 1469 (9th Cir. 1986); *United States v. Binder*, 794 F.2d 1195, 1198 (7th Cir.), *cert. denied*, 479 U.S. 869 (1986).

B. The Law of Abandonment

The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. Amdmt. IV. A person may possess a privacy interest in the contents of personal luggage. *United States v. Place*, 462 U.S. 696, 707 (1983). However, that privacy interest can be forfeited where the person abandons the luggage. *United States v. Rush*, 890 F.2d 45, 48 (7th Cir. 1989). Fourth Amendment protection does not extend to abandoned property. *Abel v. United States*, 362 U.S. 217, 241 (1960).

This case involves a question of pre-search abandonment. We are not presented with a question of whether a reasonable suspicion or probable cause justified Kinsella's search

of Rem's suitcase. If Rem indeed abandoned the suitcase before the police searched it, the Fourth Amendment inquiry ends.

A test has been articulated for determining whether an abandonment has occurred for purposes of Fourth Amendment analysis:

> The test for abandonment is whether an individual has retained any reasonable expectation of privacy in the object. This determination is to be made by objective standards. An expectation of privacy is a question of intent which "may be inferred from words spoken, acts done, and other objective facts."

United States v. Jones, 707 F.2d 1169, 1172 (10th Cir.), *cert. denied*, 464 U.S. 859 (1983) (quoting *United States v. Kendall*, 655 F.2d 199, 201 (9th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982)); *see also United States v. Hedrick*, 922 F.2d 396, 397 (7th Cir.) (abandonment depends on whether expectation of privacy in object is "objectively reasonable"), *cert. denied*, 112 S. Ct. 147 (1991); *United States v. Akin*, 562 F.2d 459, 464 (7th Cir. 1977), *cert. denied*, 435 U.S. 933 (1978). "When a person voluntarily abandons property . . . he forfeits any reasonable expectation of privacy that he might have had in the property." *United States v. Lee*, 916 F.2d 814, 818 (2d Cir. 1990).

Initially we must address Rem's attempt to steer the court's abandonment inquiry away from the objective information available to the police. A Fourth Amendment inquiry turns on the perspective from which we view the physical separation of defendant and his suitcase. As one court stated:

> The primary question on appeal is whether abandonment is to be determined by reference to [defendant's] subjective intent or by reference to the objective manifestation of an individual's intent, i.e., whether a subjective or an objective test applies.

Kendall, 655 F.2d at 200.

Rem urges this court to focus on his own subjective desire to regain possession of the suitcase as proof of his expectation of privacy. This obviously will not work. His subjective "intent" could be any hindsight excuse that fits the situation. We must instead examine the objective facts as the various agents encountered them.

This court has stated that an individual cannot avoid a finding of abandonment by offering nothing more than a "self-serving, non-factual declaration that he expected privacy." *Wilson v. Health & Hosp. Corp.*, 620 F.2d 1201, 1213 (7th Cir. 1980); *see also Rush*, 890 F.2d at 48 (court may look "beyond his disavowal [of ownership] and examine the surrounding circumstances" using a "totality of circumstances" test, and focusing on whether or not the police officers "were justified in concluding that Mr. Rush had no expectation of privacy with respect to the bag. . . .").[2] 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b) at 465 & § 2.1(c) at 309 (2d ed. 1987).

This court must ask, then, whether Rem relinquished the suitcase under circumstances which indicated to the police that he had no justified expectation of privacy in the contents of that suitcase. In order to determine whether a pre-search abandonment has occurred, the flow of information considered stops at the moment the police officer opened the suitcase. The objective facts known to the police standing on the train platform in Union Station with the suitcase determine whether Rem could reasonably have any continued expectation of privacy in the suitcase.

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[2] Other circuits similarly focus on objective manifestations of defendant's intent. *See, e.g., United States v. Hawkins*, 681 F.2d 1343, 1345 (11th Cir.), *cert. denied*, 459 U.S. 994 (1982); *United States v. Kendall*, 655 F.2d 199, 200-01 (9th Cir. 1981), *cert. denied*, 455 U.S. 941 (1982); *United States v. Brown*, Nos. 77-2106, 78-1646, slip op. at n.49 (D.C. Cir. March 21, 1980); *United States v. Taborda*, 635 F.2d 131 (2d Cir. 1980); *United States v. Williams*, 569 F.2d 823, 826 (5th Cir. 1978); *United States v. Colbert*, 474 F.2d 174 (5th Cir. 1973).

C. Information Known to the Police at the Time of the Search

Rem asserts that he doggedly chased after the runaway suitcase, making "every human effort to return to the Amtrak train [in Chicago]." Failure to retrieve a checked suitcase from a baggage claims area does not automatically constitute abandonment. "An individual may depart from an airport without claiming her luggage for a variety of reasons, with full and legitimate intent to return and claim the baggage." *United States v. Tolbert*, 692 F.2d 1041, 1044 (6th Cir. 1982), *cert. denied*, 464 U.S. 933 (1983). But the police were not merely confronted with a train passenger who failed to claim his luggage from the Amtrak train when it arrived in Chicago.

Instead, the facts here differ considerably from cases where an airline or train passenger failed to promptly retrieve checked luggage from the claim baggage area at the airport or train station. *See, e.g., Lee*, 916 F.2d at 818 (failure to promptly claim luggage *checked* with an airline does not necessarily constitute an abandonment) (citing *United States v. Oswald*, 783 F.2d 663, 667 (6th Cir. 1986); *United States v. Sanders*, 719 F.2d 882, 885-86 (6th Cir. 1983)). Rem never checked his bag with Amtrak. Instead, he chose to place the suitcase, which had no identification on it, in a public luggage rack on the train, and then abruptly left the train without it before reaching his destination. Rem's failure to pick up the luggage along with several other factors indicated that he had abandoned the luggage and retained no legitimate expectation of a privacy interest in it. *See Nordling*, 804 F.2d at 1469 (court must consider the totality of the circumstances to determine whether a person's words and acts indicate he has relinquished a reasonable expectation of privacy in the property).

The police were aware that the suitcase was found on a luggage rack accessible to anyone on the train. While Rem argues that he left his suitcase in his private compartment, that was a credibility question for the district

court to resolve. The district court found that he left the suitcase in the rack, not in the private compartment. This finding is supported by the evidence. Kinsella testified that the suitcase was found on the luggage rack located next to the exit on the first level of the car. Bobko supported this, testifying that Kinsella and the crew chief stepped out of Bobko's view for only "a few seconds," and then immediately returned with the suitcase.

Rem cites the police reports in support of his testimony. However, the reports do not contradict the district court's findings. One police summary report states the suitcase was found in the "sleeper car"; another police summary report points to the "train compartment"; and the criminal complaint refers to the "sleeping car." The district court correctly noted that none of the reports expressly indicated that the suitcase came from the upstairs private compartment number nine. Moreover, there was no clear error in the court's finding that Rem would have been more likely to leave it on the downstairs public rack in order to "draw attention away from himself."

Furthermore, it is generally recognized that the privacy interest of people who are in transit on "public thoroughfares are substantially less than those that attach to fixed dwellings." *United States v. Whitehead*, 849 F.2d 849, 854 (4th Cir.), *cert. denied*, 488 U.S. 983 (1988) (citing *inter alia*, *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970)); *see also United States v. Colyer*, 878 F.2d 469, 476 (D.C. Cir. 1989). The luggage rack was available to all passengers, located right next to an exit door. Even if the suitcase had been found in the private sleeper compartment, it would hardly be justified for Rem to expect to retain a heightened privacy interest in it.[3] After all, he had mysteriously left the train

[3] *See, e.g., United States v. Colyer*, 878 F.2d 469, 475-76 (D.C.Cir. 1989) (court rejects defendant's argument that his Amtrak roomette is like a hotel room or apartment, finding that "[w]hile an Amtrak sleeper car may in some ways resemble a residence, it enjoys no

(Footnote continued on following page)

at a stop many miles before his scheduled destination. And when they removed his suitcase, all passengers and all other luggage were gone.

Rem also argues that he only stepped away from the train for a few moments to telephone Hector. The trial court found this testimony to be incredible. The district court believed that Rem was nervous about the Kansas City drug-related arrests made in his car on the train, deboarded at Chillicothe in order to distance himself from the cocaine-laden suitcase, and later thought better of the idea, fearful of Hector the supplier's response to news of the intentionally abandoned crack cocaine.

The district court did not err in finding that Rem may have initially believed that prudence dictated he leave the train and the suitcase, approach Chicago by another route, and scrutinize Union Station for authorities who might be paying special attention to the drug-laden suitcase. It is irrelevant that Rem might have made an unwise tactical decision in Chillicothe, based on his fear that the police

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[3] *continued*
such status in the law"); *United States v. Whiteheud*, 849 F.2d 849, 854 (4th Cir.), *cert. denied*, 488 U.S. 983 (1988) (suspect could get off train at any stop); *United States v. Tartaglia*, 864 F.2d 837, 841 (D.C.Cir. 1989) (no heightened expectation of privacy in train roomette; automobile exception applied); *United States v. Johnston*, 497 F.2d 397, 398-99 (9th Cir. 1974) (upholding warrantless search of suitcase on Amtrak train; agent "was not required to assume that Defendant would stay on the train with the marijuana in the suitcases all the way to New York City," since he could "depart with the suitcases at some stop along the way," or even hand them over "at some intermediate point to an accomplice"); *United States v. Dimick*, 790 F. Supp. 1543, 1549 (D.Colo. 1992) (sleeping compartment on train differs from hotel room); *United States v. Liberto*, 660 F. Supp. 889, 892 (D.D.C. 1987) (upholding warrantless search of train passenger's suitcase; if authorities wired ahead to another jurisdiction to obtain a warrant there, they risk a situation where "defendant might well have left the train at an earlier stop"), *aff'd. without opinion*, 838 F.2d 571 (D.C.Cir. 1988).

might have legal grounds for searching the suitcase or for arresting him in Chicago.[4]

The significant piece of information which the police relied upon in deciding the suitcase had been abandoned is the report that Rem had "jumped off" the train prior to its reaching Chicago. The police knew that Chillicothe was not an announced passenger break for the train; that Rem was not scheduled to deboard at that stop; and that he left the train hurriedly, almost knocking over another passenger. Moreover, the trial court did not believe Rem's testimony that he did not hear the train leave, since Rem had an unobstructed view of the tracks, only 40 feet from the telephone. The district court found: "I also have a lot of trouble believ[ing] that any train . . . that size could leave without making any noise or substantial noise. . . ."

In addition, the police were aware that prior to leaving the train, Rem had acted peculiarly, raising the suspicions of the train crew. He had also showed unusual concern about the Kansas City arrests. Other facts known about Rem's trip, such as his paying over $700 cash for the ticket just before departure and giving a wrong telephone number, fit the profile of a drug courier. Moreover, Rem took one of his bags when he "jumped off" the train, yet left the bag which held the cocaine in a common area with no identification attached.

Thus, the circumstances known to Kinsella at the time of the search supported a conclusion that the suitcase had been abandoned.

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[4] *See also* 1 Wayne R. LaFave, *Search and Seizure* § 2.6(b) at 474 (2d ed. 1987), explaining: "Surely the Fourth Amendment does not protect people from decisions which, in retrospect, appear unwise, and thus the mere fact that B (correctly or incorrectly) thought he was going to be searched and consequently attempted to get rid of the incriminating evidence is not enough to negate his abandonment."

D. Reassertion of Privacy Interest

Rem points repeatedly to the moment in Chillicothe when perhaps a change of heart prompted him to travel to Chicago and find his suitcase. His purported intention to later retrieve the object is irrelevant. In *United States v. Williams*, 569 F.2d 823 (5th Cir. 1978), the court found that an unhitched trailer which defendant had left parked in a rest stop area when he realized he was being followed, had been abandoned:

> [Defendant] knew he was followed by government officers. His only conceivable purpose in leaving the trailer unguarded and unlocked in the parking area was to rid himself of the vehicle with its incriminating contents [marijuana]. Perhaps he retained a hope that he might accomplish two objects: the protection of himself from possession of evidence while he was pursued, and the chance of recovery of the trailer if neither the officers nor anyone else took it. . . . Williams was just like the bank robber who having a gun, finds himself pursued, and in his hope of escaping detection throws the gun into a yard—where, if it is not picked up he might retrieve it. Such conduct is transparently an abandonment of the tight grip of ownership and reliance solely on the feeble hope of re-acquisition.

Id. at 826.

Similarly, in *United States v. Oswald*, 783 F.2d 663, 668 (6th Cir. 1986), the court found abandonment where the defendant left a burned-out car on the freeway, with a metal suitcase in the trunk. The court held that "it makes no difference that defendant may have entertained hope of regaining possession at some future time." The court explained: If, under an objective standard, defendant abandoned the metal briefcase, "we fail to see how [his] subsequent conduct . . . could possibly have revoked the abandonment *nunc pro tunc*, even if [the police officer who

searched the suitcase] had known of such conduct. . . ." *Id.* at 668.[5]

Rem argues that he fully intended to claim ownership of the suitcase, even after the police broke into it and found cocaine. The trial court discounted this testimony: "I also find it very incredible if he was informed that the police had broken into the bag, had seized the bag and broken into it, that it was still his intention at that time to assert ownership of the bag. That's absolutely ridiculous and I don't believe it." We cannot say that this finding is clearly erroneous.

The record supports the district court's finding that Rem did not actually intend to rush to the incoming Chicago train to quickly regain possession of the suitcase before the police found it. Notably, Rem arrived in Chicago and went to a motel to change his clothes and make several telephone calls. The district court stated: "I'm very puzzled in view of his explanation of what happened here that if he was concerned, as I believe he certainly would have reason to be concerned, about his safety that he would have stopped on the way from Midway airport to the Amtrak station and taken the time to check into a motel based on his explanation. I find that incredible."

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[5] Other circuits hold similarly in regard to subjective intent to return to retrieve an object. *See, e.g., United States v. Lewis*, 921 F.2d 1294, 1302 (D.C.Cir. 1990) (it is "irrelevant" that bus passenger "might have repossessed" her tote bag which the police officer took from rack above seats after all passengers denied ownership); *United States v. Thomas*, 864 F.2d 843, 846 n.5 (D.C.Cir. 1989) (legal significance of defendant's conduct "is not altered by the fact that he might have intended to retrieve the bag later"); *United States v. Jones*, 707 F.2d 1169, 1172 (10th Cir.) (defendant's "hope[ ] that the police would not find [satchel] and that he could later retrieve it" is not determinative), *cert. denied*, 464 U.S. 859 (1983); *Kendall*, 655 F. 2d at 202 (once suitcase is abandoned, later assertion that defendant fully intended to retrieve it has no effect); *Smith v. United States*, 292 A.2d 150, 151 (D.C. 1972) (it is "irrelevant" that defendant "intended eventually to return and retrieve" pistol he discarded during police chase).

In addition, when the police approached him, Rem *denied* having been on the train from Los Angeles—or on any train at all. He had been in Chicago two weeks; could not remember the name or location of his hotel; and was merely "visiting" and "looking around" at the train station. This is the equivalent to an oral disclaimer of ownership. *See Tolbert*, 692 F.2d at 1044-45 (court found the oral disclaimer showed abandonment). Aside from any issue of standing, at the very least, Rem's statements indicated that he had no expectation of privacy in the suitcase which did not have his name on it, and which was found on a train that defendant had never been aboard.

III.

The district court did not err in finding that Rem had abandoned the suitcase and as a result had no legitimate expectation of privacy in it or its contents. The district court's denial of Rem's motion to suppress the evidence found is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: January 26, 1993

BEFORE:

Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge

No. 92-1672

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

DAVID REM,

Defendant-Appellant

Appeal from the United States District Court for the
Central District of Illinois, Peoria Division
No. 91 CR 10043, Michael M. Mihm, Chief Judge

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

SUPREME COURT OF THE UNITED STATES

No. A-807

David Rem,

Petitioner

v.

United States

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including June 11, 1993.

/s/ John Paul Stevens
Associate Justice of the Supreme
Court of the United States

Dated this 22nd
day of April, 1993.

[Filed July 24, 1991]

IN THE UNITED STATES DISTRICT COURT
IN THE CENTRAL DISTRICT OF ILLINOIS
AT PEORIA

UNITED STATES OF AMERICA, Plaintiff,	)	No. 91-10043-01
v.	)	
DAVID REM, Defendant.	)	Title 21, United States Code, Section 841(a)(1)

INDICTMENT

The Grand Jury charges:

Count 1

On or about May 28, 1991 in Peoria County, in the Central District of Illinois, the defendant,

DAVID REM,

did knowingly and intentionally possess with the intent to distribute a mixture or substance containing cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

/s/ _____
Foreperson

/s/ J. William Roberts by BC
United States Attorney

[Filed September 26, 1991]

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

UNITED STATES OF AMERICA, Plaintiff,	)	No. 91-10043
vs.	)	
	)	Honorable
DAVID REM,	)	Michael M. Mihm
Defendant.	)	

AFFIDAVIT

Tom Quinn, being first duly sworn, deposes and states upon his oath as follows:

1. I am the general supervisor of mail, baggage and express for Amtrak and have been so employed for approximately 17 years.

2. I have been advised by attorney Kevin Milner that his client, David Rem, traveled on Amtrak train number 4 from Los Angeles, California bound for Chicago, Illinois from May 25, 1991-May 28, 1991. Mr. Milner also advised that on May 28, 1991 Mr. Rem deboarded the train in Chillicothe, Illinois leaving his suitcase behind in his private compartment. Further, I was advised that when the train arrived in Chicago later that day, the bag was recovered from the train and searched by agents of the Drug Enforcement Administration.

3. It is the policy of Amtrak to retrieve items left on the trains by passengers and to turn them in to the Lost and Found Department. Such is the case whether items are left in the common passenger areas or in private compartments such as that occupied by Mr. Rem.

4. The Amtrak Lost and Found Department at the Chicago Union Station, where the train arrived on May 28, 1991, is located in the parcel room at the station. The Department takes in approximately 20-30 items a day, including 10-12 suitcases or similar type luggage.

5. When a piece of luggage is turned into the Department by the Amtrak train employee, a written receipt is prepared indicating the type of luggage, the name of the employee who turned it in, and the date and time. The luggage is then held for 61 days and if not claimed, it is destroyed.

6. If the bag has no outside identification, the bag *may* be broken into sometime during the 15-30th day, but only sometimes, and never before the 15th day. If the bag is opened after the 15th day, it is done so with my approval and according to my discretion. The purpose is only to obtain a name, phone number, etc. to use to contact the owner.

7. In Mr. Rem's case, I would not have allowed Amtrak personnel to break into the suitcase on May 28, 1991 and Mr. Rem would have been able to claim his luggage when he arrived at the station later that day.

Further Affiant Sayeth Naught.

/s/ TOM QUINN
Tom Quinn, General Supervisor,
Amtrak

SUBSCRIBED AND SWORN to before
me this 23rd day of September, 1991.

/s/ Susan A. Schroer
Notary Public

(A)

RAID ACTIVITY SUMMARY
ORGANIZED CRIME DIVISION/CHICAGO POLICE

*CHECK ONE ☐CONTROLLED BUY ☐CONTROLLED BUY/ARREST ☒ON VIEW/ARREST/POSSESSION
☐ARREST WARRANT ☐SEARCH WARRANT ☐NEGATIVE WARRANT ☐OTHER (Specify)

*UNIT 288

*INCIDENT NO. 101303 | *STAT NO. | *FBI NO. P-719473 | *DATE OF ARREST 28 MAY 91 | *TIME 1640 | *LOCATION OF ARREST 210 S. CANAL | *DISTRICT 1001 | SEARCH WARRANT NO.

*DEFENDANT ☒ARRESTED ☐WANTED — REM, David STUART | *SEX/RACE/D.O.B. M/W/17 JAN 64 | *C.B. NO. | *I.R. NO./Y.D. NO. | *GANG AFFILIATION
ADDRESS: 7715 KEN FOREST LN. FOREST Hills, NY 11375
*CHARGES: 1. Possession of COCAINE 2. 3. 4.

*DEFENDANT ☐ARRESTED ☐WANTED | *SEX/RACE/D.O.B. | *C.B. NO. | *I.R. NO./Y.D. NO. | *GANG AFFILIATION
ADDRESS
*CHARGES: 1. 2. 3. 4.

*DEFENDANT ☐ARRESTED ☐WANTED | *SEX/RACE/D.O.B. | *C.B. NO. | *I.R. NO./Y.D. NO. | *GANG AFFILIATION
ADDRESS
*CHARGES: 1. 2. 3. 4.

*DEFENDANT ☐ARRESTED ☐WANTED | *SEX/RACE/D.O.B. | *C.B. NO. | *I.R. NO./Y.D. NO. | *GANG AFFILIATION
ADDRESS
*CHARGES: 1. 2. 3. 4.

*VICTIM(S) | *SEX/RACE/D.O.B. | *GANG AFFILIATION

DEFENDANT'S EXHIBIT

*NARCOTICS RECOVERED (TYPE, EST. WEIGHT, STREET VALUE)
18 kilograms of COCAINE
E.S.V. $2,557,952

*WEAPONS RECOVERED (CALIBER & MAKE)
1. NONE
2.
3.

*RAID RELATED MONEY SEIZED
$ 799.00

*VEHICLE SEIZED – NO.

*OTHER ITEMS SEIZED

*JUVENILES ONLY (CHECK ONE)
☐COMMUNITY ADJUSTED ☐JUVENILE COURT

REMARKS
THE ABOVE SUBJECT ARRESTED IN CHICAGO AFTER HIS SUITCASE FROM HIS SLEEPER CAR ABOARD AMTRAK TRAIN #4 WAS FOUND TO CONTAIN 18 KS COCAINE

*REPORTING OFFICER(S) | *STAR NO.(S) | *SERGEANT | *STAR NO.

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POLICE PERSONNEL ON SCENE: Det. T. Kinsella, #11709/ Det. M. Bobko, #13442/ Det. E. Wodnicki, #4033/ Sgt. P. Riordan, #1704 of Unit 208
Inv. Dennis Kroll of AMTRAK Police

EVIDENCE SEIZED, INV. NOS: Evidence Technician Beat 2309 P.6 BASSIC # 3519
One (1) dark blue, hard-sided "Samsonite" suitcase containing men's clothing, plastic bags, fabric strips, gloves was seized from the arrestee's train compartment by Det. Kinsella and inventoried under #761 140 for submission to the Trace Unit of the Crime Lab

Eighteen (18) plastic wrapped, rectangualr packages each containing an amount of white, crystalline powder (FTP for cocaine) was seized from the above described bag by Det. Kinsella. The exhibits were maintained for the preservation of latent fingerprints and submitted to the DEA Lab for expert analysis.

$799.00 USC was oized from the person of the arrestee and inventoried under #761 139.

ESTIMATED WEIGHT AND E.S.V.: Eighteen kilograms of suspected cocaine valued at $2,557,952.00

HISTORY OF INVESTIGATION: This is a brief summary of this investigation. For a detailed report refer to the DEA Reports submitted under case file: REM, David S.

Train #4 arriving in Chicago on 20 May 91, having originated in Los Angeles, California. Upon the arrival of the train the R/Os determined that the subject had fled the train in Chillicothe, leaving a hard-sided suitcase abandoned in his compartment. The bag was found to contain 18 kilos of suspected cocaine. The subject then appeared in the station in Chicago and attempted to locate the abandoned bag at which time he was arrested after being identified as the owner of the suitcase.

Sgt P Riordan 1704 20 May 91.

FOR USE BY BUREAU OF INVESTIGATIVE SERVICES ONLY

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